Supreme Court, U.S.
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NO. 91-11

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ALISON KING,

Petitioner,

v.

PRUDENTIAL-BACHE SECURITIES, INC. et al.,

Respondents.

Petition for Writ of Certiorari to the
Supreme Court of California and
California Court of Appeal,
First District, Division Four

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
I.	INTRODUCTORY STATEMENT	1
II.	STATEMENT OF THE CASE	3
	A. Factual Background	3
	B. Procedural History	7
III.	SUMMARY OF ARGUMENT	15
IV.	ARGUMENT	16
	A. Because Petitioner's Appeal To This Court Does Not Satisfy The Criteria Set Forth In Supreme Court Rule 10, The Petition Should Be Denied In Its Entirety	16
	B. The Court Of Appeal's Decision Correctly Applied California Law	18
	C. The Court of Appeal's Decision Is In Accordance With Controlling Federal Law	21
	D. Petitioner Is Not Entitled To A Jury Trial Under State Or Federal Law	24

E. The Arbitration Agreements Clearly Encompass Petitioner's Claims 28

V. CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Gilmer v. Interstate/Johnson Lane Corporation,
___ U.S. ___, 111 S.Ct. 1647 (1991) 27

Letendre v. Fugate,
701 F.2d 1093 (4th Cir. 1983) 25

Minn. & St. Louis R.R. v. Bombolis,
241 U.S. 211 (1916) 25

Moseley v. Electronic Facilities,
374 U.S. 167 (1963) 23, 24

Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,
460 U.S. 1 (1983) 26

Muh v. Newberger, Loeb & Co., Inc.,
540 F.2d 970 (9th Cir. 1976) 27

Olesen Trust Co. of Chicago,
245 F.2d 522 (7th Cir. 1957) 25

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395(1967) 22, 23, 24, 26

Smiga v. Dean Witter Reynolds, Inc.,
766 F.2d 698 (2d Cir. 1985) cert. den., 475 U.S.
1067 (1986) 25

Southland Corp. v. Keating,
465 U.S. 1 (1984) 21

STATE CASES

Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc.
v. 100 Oak Street,
35 Cal.3d 312, 673 P.2d 251, 197 Cal.Rptr. 581
(1983) 18, 20, 21, 25

Ford v. Shearson Lehman/American Express, Inc.,
180 Cal.App.3d 1011, 225 Cal.Rptr. 895 (1986) 19, 20, 21

Hall v. Nomura Securities International,
219 Cal.App.3d 43, 268 Cal.Rptr. 45 (1990) 27

Herman Feil, Inc. v. Design Center of Los Angeles,
204 Cal.App.3d 1406, 251 Cal.Rptr. 895 (1988) 19, 20, 21, 25

King v. Prudential-Bache Securities, Inc., et al.,
226 Cal.App.3d 749, 277 Cal.Rptr. 214 (1990) 14

Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
67 Cal.App.3d 19, 136 Cal.Rptr. 378 (1977) . 19, 20, 21

Strotz v. Dean Witter Reynolds, Inc.,
223 Cal.App.3d 208, 272 Cal.Rptr. 680 (1990) 19, 20, 21

Thorup v. Dean Witter Reynolds, Inc.,
180 Cal.App.3d 228, 225 Cal.Rptr. 521 (1986) . . 21, 22

Tonetti v. Shirley,
173 Cal.App.3d 1144, 219 Cal.Rptr. 616 (1985) 22

FEDERAL STATUTES

9 U.S.C. §§ 2, et seq 22

MISCELLANEOUS

Rule 345.1, 2 NYSE Guide (CCH) ¶ 2345 4

Rule 347, 2 NYSE Guide (CCH) ¶ 2347 4

Supreme Court Rule 10 . . . . . 16, 17

Supreme Court Rule 15.1 3

PARENT/SUBSIDIARIES
OF
RESPONDENT PRUDENTIAL-BACHE SECURITIES INC.

PARENT ENTITIES

PRUDENTIAL SECURITIES GROUP, INC.
PRUDENTIAL CAPITAL AND INVESTMENT SERVICES, INC.
PRUCO, INC.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

SUBSIDIARIES

BACHE & CO. (LEBANON) S.A.L.
BACHE & CO. S.A. de C.V. (MEXICO)
BACHE HALSEY STUART COMMODITIES S.A.
BACHE HALSEY STUART SHIELDS (ANTILLES) N.V.
BACHE INSURANCE AGENCY, INCORPORATED
BACHE INSURANCE OF ARIZONA INC.
BACHE INSURANCE OF KENTUCKY, INC.
BACHE SHIELDS SECURITIES CORPORATION
BANOM CORPORATION
GELFAND, QUINN & ASSOCIATES, INC.
MOROSTO NOMINEES INCORPORATED
P-B FUTURES MANAGEMENT INC.
PRUDENTIAL MUTUAL FUND MANAGEMENT, INC.
PRUDENTIAL MUTUAL FUND DISTRIBUTORS, INC.
PRUDENTIAL MUTUAL FUND SERVICES, INC.
P-B HOLDING JAPAN INC.
PRUDENTIAL SECURITIES (JAPAN) LIMITED

PRUDENTIAL-BACHE CAPITAL FUNDING PUERTO RICO INC.
PRUDENTIAL-BACHE FUTURES ASIA PACIFIC LTD.
PRUDENTIAL-BACHE SECURITIES ASIA PACIFIC, LTD.
PRUDENTIAL-BACHE SECURITIES (BELGIUM) INC.
PRUDENTIAL-BACHE SECURITIES (ESPANA), S.A.
PRUDENTIAL-BACHE SECURITIES (FRANCE) S.A.
PRUDENTIAL-BACHE SECURITIES (GREECE) S.A.
PRUDENTIAL-BACHE SECURITIES (HOLLAND) INC.
PRUDENTIAL-BACHE SECURITIES (HOLLAND) N.V.
PRUDENTIAL-BACHE SECURITIES (HONG KONG) LIMITED
PRUDENTIAL-BACHE FUTURES (HONG KONG) LIMITED
PRUDENTIAL-BACHE SECURITIES (ITALY) INC.
PRUDENTIAL-BACHE SECURITIES (LUXEMBOURG) INC.
PRUDENTIAL-BACHE SECURITIES (MONACO) INC.
PRUDENTIAL SECURITIES (SOUTH AMERICA) INCORPORATED
PRUDENTIAL SECURITIES (URUGUAY) S.A.
PRUDENTIAL SECURITIES (ARGENTINA) INCORPORATED
PRUDENTIAL-BACHE SECURITIES (SWITZERLAND) INC.
PRUDENTIAL-BACHE SECURITIES (U.K.) INC.
SHIELDS MODEL ROLAND COMPANY
SHIELDS MODEL ROLAND NOMINEES
SHIELDS MODEL ROLAND SECURITIES INCORPORATED
BACHE INSURANCE AGENCY OF MISSISSIPPI, LTD.*
BACHE INSURANCE AGENCY OF OKLAHOMA, INC.*
BACHE INSURANCE AGENCY OF TEXAS, INC.*

*CORPORATION OWNED BY EMPLOYEES OF PRUDENTIAL SECURITIES INCORPORATED

(PEM MISC 3751)

I.

INTRODUCTORY STATEMENT

This Brief in Opposition to Petition for Writ of Certiorari is filed on behalf of Prudential-Bache Securities Inc. ("Prudential-Bache"), Carrington Clark, Jr. and Eugene Stansbery (collectively referred to herein as "Respondents"). The Respondents were defendants and respondents in the proceedings below. This Brief is filed in opposition to the Petition filed by Alison King, plaintiff and appellant in the proceedings below.

Petitioner claims that she is a victim of eight (8) erroneous prior decisions by lower tribunals. Petitioner's unsubstantiated assertions that her claims were not subject to arbitration have been rejected three (3) times by the California Superior Court,

once by a Panel of New York Stock Exchange ("NYSE") Arbitrators, three (3) times by the California Court of Appeal and once by the California Supreme Court. Indeed, Petitioner's purported constitutional claims are merely a "smokescreen" to divert the Court's attention from her true motive -- to obtain a different factual determination than that made by all of the tribunals below.

Petitioner does not raise a federal question that was decided in any way that conflicts with a state court of last resort. Nor does Petitioner raise an important question of federal law that has not been, but should be, decided by this Court. In fact, the issues presented by Petitioner were decided below in complete accordance with federal and state law. Accordingly, the Petition should be denied in its entirety.

II.

STATEMENT OF THE CASE

A. Factual Background[1]

In July and August 1984, Petitioner and Prudential-Bache manager Eugene Stansbery engaged in discussions regarding possible employment by Prudential-Bache of Petitioner as a stockbroker. During those discussions, Petitioner represented that she had an excellent record at her prior place of employment, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Petitioner was hired on a provisional basis by Prudential-Bache, subject to the receipt of an acceptable U-5

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[1]The Petition is replete with misstatements of fact. Therefore, Respondents set out in some detail the background and procedural history of this matter. (Supreme Court Rule 15.1).

termination form from Merrill Lynch.[2] (Clerk's Transcript on Appeal lodged with the California Court of Appeal, First Appellate District ("C.T.") 312-316.)

Prudential-Bache did not receive a Form U-5 from Merrill Lynch which established that the Petitioner would be an acceptable employee; rather, in early September 1984, Prudential-Bache received a Merrill Lynch U-5 termination form for Petitioner which showed a myriad of legal problems. (C.T. 604-606.) The Form U-5 disclosed more than ten (10) customer complaints against Petitioner while she was in Merrill Lynch's office in Sunnyvale, California, including a U.S. District Court action alleging unauthorized trading and

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[2]A Form U-5 is a standardized form in the securities industry and must be completed by an employee's branch manager or supervisor whenever an employee resigns or is terminated. The Form U-5 must be filed with all of the exchanges with which that person is registered. NYSE Rule 345.1, 2 NYSE Guide (CCH) ¶ 2345.

fraud. (C.T. 606, 620-629.) The Form U-5 also disclosed that during the last few weeks of Petitioner's employment at Merrill Lynch, it became necessary to "bust" and adjust more than seventy (70) transactions in Petitioner's customers' accounts, creating additional losses to Merrill Lynch in the amount of $9,850.00. (C.T. 606.)

In addition to these facts, Respondents learned that Petitioner was the subject of at least two (2) customer complaints made while she was employed in Merrill Lynch's Buffalo, New York office. The complaints made against Petitioner included claims for unauthorized trading, fraud, misrepresentation, churning and other serious offenses. (C.T. 605-606, 620-629, 631, 633, 635-647.)

Petitioner's efforts to conceal the many claims which had been made against her by her clients were nothing short of incredible.

First, Petitioner agreed in writing that she would disclose in writing all "prior or existing customer complaints," but she failed to do so. (C.T. 612.)

Second, Petitioner executed a Form U-4 Employment Application in which she represented to Prudential-Bache that the reason she was leaving Merrill Lynch to join Prudential-Bache was for a "better opportunity." (C.T. 615.) This was clearly not the case as the U-5 termination form filed by Merrill Lynch indicates that Petitioner did not voluntarily resign, but instead was "released" by Merrill Lynch because of a "series of customer complaints." (C.T. 605.)

Finally, in completing the Form U-4 Employment Application, Petitioner certified to Prudential-Bache that she had never been the subject of a "major complaint or legal proceeding." (C.T.

616-617.) As noted above, Petitioner had in fact been the subject of numerous serious complaints, including the aforementioned U.S. District Court proceeding. (C.T. 604-606, 620-637.) Upon discovery of Petitioner's blatant misrepresentations regarding her employment record, Prudential-Bache terminated her provisional employment on September 14, 1984. (C.T. 312-316.)

B. Procedural History

On December 4, 1985, Petitioner filed an Amended Complaint alleging causes of action for wrongful termination and related claims against Respondents as well as Merrill Lynch and several Merrill Lynch employees. (C.T. 10.) Petitioner's Amended Complaint does not contain any constitutional claims. (Id.)

On January 24, 1986, Respondents filed a Petition to Compel Petitioner's claims to arbitration in the state proceedings. Respondents' Petition alleged that in conjunction with Petitioner's employment by Respondents, Petitioner executed an "Employment Agreement" and a Uniform Application for Securities Registration. Both documents contain valid, enforceable agreements to arbitrate any disputes between Petitioner and Respondents. (Petitioner's Appx., p. 4a.) On April 7, 1986, the Honorable Maxine Chesney of the California Superior Court granted Respondents' Petition to Compel Arbitration in accordance with the arbitration rules of the NYSE and stayed all judicial proceedings pending completion of the arbitration. (Petitioner's Appx., p. 5a.)

On August 25, 1987, Petitioner moved to dissolve or modify the stay of proceedings. In essence, Petitioner sought to have

Judge Chesney reconsider the granting of Respondents' Petition to Compel Arbitration and to Stay Proceedings. Indeed, Petitioner raised the same allegations of fraud in the inducement as she raised in opposition to the original Petition to Compel Arbitration. (Petitioner's Appx., p. 5a.) In support of her Motion to Reconsider, Petitioner argued that the arbitration agreements were not enforceable. This was the same argument that Judge Chesney had considered and previously rejected in granting Respondents' Petition to Compel Arbitration and to Stay Proceedings. Judge Chesney denied Petitioner's Motion to Dissolve or Modify the Order Staying Proceedings on October 21, 1986. (Id.)

Petitioner's quest to avoid NYSE arbitration continued. After receiving Judge Chesney's Order denying her Motion to Dissolve or Modify, Petitioner applied to the California Court of Appeal, First

Appellate District (Division Four) for a writ of certiorari and/or a writ of prohibition. The Petition was denied on December 17, 1986. (Id.)

On or about May 8, 1987, Petitioner finally filed a Statement of Claim with the NYSE, thereby initiating arbitration proceedings against Respondents. Petitioner's Statement of Claim specifically requested that:

> The arbitrators rule on the arbitrability of each of her claims and upon their authority to order each item of relief requested above.

Therefore, Petitioner expressly placed before the arbitrators the issue of whether the arbitration agreements were valid. (Petitioner's Appx., p. 5a.)

On October 18, 19 and 20, 1988, Petitioner's claims against Respondents were arbitrated before a four-person arbitration panel in the forum provided by the NYSE. At the close of the arbitration hearing, Petitioner's counsel was asked if Petitioner had a full and fair opportunity to present her case. Petitioner's counsel, on behalf of Petitioner, stated that she did have a full and fair opportunity to present her claims. (Id.)[3] After taking the matter under submission, the arbitrators rendered a decision dismissing Petitioner's claims in all respects. Costs in the amount of $4,500 were assessed against Prudential-Bache. (Petitioner's Appx. pp. 5a-6a.) Thus, Petitioner's argument that the arbitration agreements were not enforceable was rejected for a fourth time.

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[3]At the hearing, Petitioner submitted approximately forty-five (45) exhibits in support of her claims against Respondents. Petitioner, who was represented by able counsel, testified at length and called other witnesses on her behalf.

On January 27, 1989, Petitioner filed in the California Superior Court a Petition to Correct and Confirm the Arbitration Award.[4] Respondents filed a Petition to Confirm the Arbitrators' Award on February 15, 1989. Petitioner filed Declarations repeating the above-stated allegations of fraud in the inducement.

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[4]Petitioner claims that she did not file a Petition to Vacate the arbitrators' award because of her erroneous belief that the arbitrators "meant" to say that her claims were dismissed since they had no jurisdiction to rule on the matter. Indeed, without citing any basis for her incredible assertion, Petitioner declared under penalty of perjury that:

> I [Petitioner] interpreted this award to be one in my favor and the language of dismissal to be consistent with a finding of non-arbitrability and timely petitioned the court to modify the award to correctly reflect the finding of non-arbitrability, the only basis on which the award could stand without implicating arbitrator misconduct, and to conform the award as corrected. (C.T. 706-707.)

Not surprisingly, the Honorable Stuart Pollak of the California Superior Court granted Respondents' Petition to Confirm the Arbitrators' Award and denied Petitioner's Petition to Correct and Confirm. (Petitioner's Appx., p. 6a.) Judge Pollak held that Petitioner's claims of fraud in the inducement were previously rejected by Judge Chesney and that, even if the fraud in the inducement argument had not already been decided, there was no credible evidence of fraud in the inducement of the arbitration clause contained in the agreements executed by Petitioner. (Id.) Judgment on the Arbitrators' Award was entered in favor of Respondents and against Petitioner on May 3, 1989. (Id.)

On June 19, 1989, Petitioner filed a Notice of Appeal. The California Court of Appeal rendered its decision affirming the judgment of the Superior Court against Petitioner on December 11,

1990. The Court of Appeal also awarded Respondents their costs on appeal. (Petitioner's Appx. p. 10a.) Petitioner filed a Petition for Rehearing on January 4, 1991. The Court of Appeal denied the Petition for Rehearing on January 10, 1991. (Petitioner's Appx. p. 2a.) In addition to denying the Petition for Rehearing, the Court of Appeal ordered that its Decision be certified for publication.[5] (Id.)

Petitioner then filed a Petition for Review to the California Supreme Court on January 20, 1991. The California Supreme Court, in bank, denied the Petition for Review on March 29, 1991. (Petitioner's Appx., p. 1a.). Thus, eight (8) tribunals have considered and rejected Petitioner's claims herein. The instant Petition followed.

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[5]The published decision is cited as King v. Prudential-Bache Securities, Inc., et al., 226 Cal.App.3d 749, 277 Cal.Rptr. 214 (1990).

III.

SUMMARY OF ARGUMENT

The arguments set forth below can be summarized as follows:

(A) Because Petitioner's Appeal To This Court Does Not Satisfy Any Of The Criteria Set Forth In Supreme Court Rule 10, The Petition Should Be Denied In Its Entirety.

(B) The Court Of Appeal's Decision Correctly Applied California Law.

(C) The Court Of Appeal's Decision Is In Accordance With Controlling Federal Law.

(D) Petitioner Was Not Entitled To A Jury Trial Under Either State Or Federal Law.

(E) The Arbitration Agreements Clearly Encompass Petitioner's Claims.

IV.

ARGUMENT

A. Because Petitioner's Appeal To This Court Does Not Satisfy The Criteria Set Forth In Supreme Court Rule 10, The Petition Should Be Denied In Its Entirety

The granting of certiorari is discretionary and is only granted where there are special and important reasons for granting review. Supreme Court Rule 10. The questions presented by Petitioner do not meet any of the criteria set forth in Rule 10.

First, because this Petition arises from the decision of a state court, the questions presented by Petitioner do not involve a conflict in the decisional law of the federal Courts of Appeals. Second, the California Court of Appeal did not decide a federal question in a

way that conflicts with a state court of last resort. Third, the Court of Appeal did not depart from "the accepted and usual course of judicial proceedings." Fourth, the Court of Appeal did not decide a question of federal law which has not been settled or which conflicts with the earlier decisions of this Court. Finally, it is apparent that there are no special reasons of significant public importance for granting the Petition in this case.

Glaringly absent from Petitioner's Brief is an explanation as to why her Petition raises issues that meet the Rule 10 criteria. Petitioner does not raise a constitutional issue inasmuch as the California Court of Appeal's decision is entirely consistent with federal law and especially the recent Supreme Court holdings expressing the strong public policy in favor of arbitration. Indeed, Petitioner impermissibly seeks to have this Court review the undisputed findings

of fact of the judicial and arbitration forums below. Accordingly, the Petition should be denied in its entirety.

B. The Court of Appeal's Decision Correctly Applied California Law

The California Court of Appeal's decision that Petitioner was not entitled to a jury trial on the issue of fraudulent inducement was entirely in conformity with California law. The Court of Appeal held that the California Supreme Court's ruling in Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 35 Cal.3d 312, 323, 673 P.2d 251, 197 Cal.Rptr. 581 (1983), required that Petitioner's claims be decided by the arbitrator, not by a court, because her claims for fraud in the inducement went to the contract containing the arbitration clause, as distinguished from fraud directed to the arbitration clause itself. (Petitioner's Appx., pp. 6a-8a.)

The Court of Appeal further held that that the Ericksen rule was applicable to Petitioner because of the factual and procedural similarities to Herman Feil, Inc. v. Design Center of Los Angeles, 204 Cal.App.3d 1406, 251 Cal.Rptr. 895 (1988). (Id.) The Court of Appeal properly concluded that, as in Feil, "the superior court and the arbitrators herein properly decided the issue of fraudulent inducement." (Id.)

Inasmuch as the Court of Appeal found Petitioner's claims distinguishable, it was not required to apply the holdings from Strotz v. Dean Witter Reynolds, Inc., 223 Cal.App.3d 208, 272 Cal.Rptr. 680 (1990), Ford v. Shearson Lehman/American Express, Inc., 180 Cal.App.3d 1011, 225 Cal.Rptr. 895 (1986), or Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 67 Cal.App.3d 19, 136 Cal.Rptr. 378 (1977). The Court of Appeal correctly held:

> The present case is more similar to Ericksen and Feil than to Main, Ford and Strotz. [Petitioner] is not a helpless investor lost in the world of stocks and bonds who can be, and is, easily dominated as were the customers in Main, Ford, and Strotz. She is an experienced broker who had been employed by Merrill Lynch. Further, she was aware that the document was an "employment agreement" as it is so labeled. She did not allege that she would have refused to sign if she knew that it contained an arbitration clause. Neither does she allege that the absence of such a clause was something she bargained for with Respondents. Rather, the circumstances under which she signed the August 20 contract seem almost identical under which the second lease was signed in Feil. In both cases, experienced knowledgeable parties signed a contract under the mistaken belief that it merely repeated the terms to which they had earlier agreed.

(Petitioner's Appx., p. 10a.)

Thus, the Court of Appeal's decision was based upon undisputed material facts established in the record and does not raise any issues that are contrary to California law. The Court of Appeal merely found that the holdings in Ericksen and Feil were controlling, and that those in Main, Ford and Strotz were not. Accordingly, the Petition should be denied in its entirety.

C. The Court Of Appeal's Decision Is In Accordance With Controlling Federal Law

It is well-settled that federal law governs all questions concerning the validity, revocability, enforceability and interpretation of arbitration clauses that come within the scope of the Federal Arbitration Act. Southland Corp. v. Keating, 465 U.S. 1, 10-11, 16 (1984); Thorup v. Dean Witter Reynolds, Inc., 180 Cal.App.3d 228, 233, 225 Cal.Rptr. 521 (1986). It is equally well-established that an employment

contract between a brokerage firm and a registered representative, such as Petitioner, involves "commerce" and, therefore, an arbitration agreement in such contract comes within the purview of the Federal Arbitration Act. 9 U.S.C. §§ 2, et seq.; Thorup at 233; Tonetti v. Shirley, 173 Cal.App.3d 1144, 1148-49, 219 Cal.Rptr. 616 (1985).

The Court of Appeal's decision that Petitioner was not entitled to a jury trial on the fraudulent inducement issue is in accordance with federal law. This Court in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-404 (1967), settled the issue raised by Petitioner when it held that any claims of fraud in the inducement of the contract generally must, in the first instance, be determined by the arbitrators. Only where the alleged fraud is directly related to the making of the agreement to arbitrate may the Court (as opposed to the arbitrators) proceed to adjudicate the fraud in the

inducement issue. Id. at 404.

Petitioner asserts that her entire employment agreement was procured by fraud. Petitioner does not, however, claim that the alleged fraud went directly to the making of the agreement to arbitrate. (Petitioner's Appx., p. 10a.) Therefore, the California Court of Appeal's decision (on three separate occasions) that the Superior Court and the Arbitrators properly decided the issue of fraudulent inducement was in accordance with controlling federal law. See, Prima Paint, 388 U.S. at 403-04.

Petitioner's reliance on Moseley v. Electronic Facilities, 374 U.S. 167 (1963) is misplaced. Not surprisingly, Petitioner does not provide any explanation why Moseley supports her position. In Moseley, the Court held that the fraudulent inducement went to the

arbitration clause itself and therefore had to first be addressed by the district court prior to compelling arbitration. Moseley, 374 U.S. at 171. Moseley is entirely consistent with this Court's subsequent ruling in Prima Paint that the issue of fraudulent inducement, where the fraud goes to the contract as a whole, must be decided in the first instance by the arbitrators. Prima Paint, 388 U.S. at 403-04. In addition, the Superior Court considered and decided the fraudulent inducement issue two times before the matter proceeded to arbitration. Accordingly, the Petition should be denied in its entirety.

D. Petitioner Is Not Entitled To A Jury Trial Under State Or Federal Law

The Court of Appeal correctly held that Petitioner was not entitled to a jury trial on the enforceability of the agreements to arbitrate. Under California law, Petitioner was not entitled to a jury

trial on her claims of fraudulent inducement. See, Ericksen at 323; Feil at 1418-19.[6] Federal law is in accord that where a stockbroker has entered into an agreement to arbitrate any dispute with a former or present employer, the stockbroker has no right to a jury trial on the issue of arbitrability. Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 706 (2d Cir. 1985) cert. den., 475 U.S. 1067 (1986).

In addition, inasmuch as Petitioner's claims of fraudulent inducement do not go to the arbitration clause itself, the issue of arbitrability was one for the arbitrators to decide in the first instance.

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[6]Petitioner apparently claims that she has "federal constitutional rights to trial by jury." (Petitioner's Brief, pp. i and 17.) To the extent Petitioner is claiming a federal right to trial by jury of her state law claims, Respondents would note that the Seventh Amendment does not apply to state court proceedings. Minn. & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916). Thus, a refusal of a jury trial in state court proceedings is not a denial of either due process or equal protection. Letendre v. Fugate, 701 F.2d 1093, 1094 (4th Cir. 1983); Olesen Trust Co. of Chicago, 245 F.2d 522, 524 (7th Cir. 1957).

See, Prima Paint, 388 U.S. at 403-404. Accordingly, the Petition should be denied in its entirety.

E. The Arbitration Agreements Clearly Encompass Petitioner's Claims

Petitioner erroneously argues that the California Court of Appeal has enlarged the scope of the arbitration clause in the employment agreement that she voluntarily entered into. Petitioner did not make this argument before the Superior Court, the arbitrators, or the California Court of Appeal. Accordingly, the argument is neither timely nor properly raised herein. The employment agreement signed by Petitioner which contains an agreement to arbitrate has been found, no fewer than seven times, to be valid and enforceable. Moreover, Petitioner ignores the well-settled precedent that agreements to arbitrate are to be broadly construed. See, Moses H. Cone Memorial Hospital

v. Mercury Construction Corp., 460 U.S. 1 (1983).

The arbitration agreements at issue herein apply to any disputes arising out of Petitioner's employment. However, even if the arbitration agreements do not encompass Petitioner's claims, there is a separate and independent basis for compelling arbitration. Petitioner does not address the fact that NYSE Rule 347 requires her, as a registered representative, to arbitrate any claims she may have against a member organization such as Prudential-Bache. See, NYSE Rule 347, 2 NYSE Guide (CCH) ¶ 2347; Gilmer v. Interstate/Johnson Lane Corporation, ___ U.S. ___, 111 S.Ct. 1647, 1651 (1991); Muh v. Newberger, Loeb & Co., Inc., 540 F.2d 970, 972-73 (9th Cir. 1976); Hall v. Nomura Securities International, 219 Cal.App.3d 43, 268 Cal.Rptr. 45 (1990).

V.

CONCLUSION

For all of the reasons stated herein, the Petition should be denied in its entirety.

Respectfully submitted,

/S/

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